

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE LARRY ALAN BURNS, JUDGE PRESIDING

UNITED STATES OF AMERICA,	)	
	)	
PLAINTIFF,	)	CASE NO. 07CR00329-LAB
	)	
VS.	)	
	)	SAN DIEGO, CALIFORNIA
	)	SEPTEMBER 4, 2007
BRENT ROGER WILKES, (1)	)	2:00 P.M.
	)	
	)	
DEFENDANTS.	)	
	)	

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REPORTER'S TRANSCRIPT

STATUS CONFERENCE

APPEARANCES:

FOR THE GOVERNMENT:

KAREN P. HEWITT, U.S. ATTORNEY  
BY: PHILLIP LB HALPERN, ESQ.  
VALERIE CHU, ESQ.  
JASON A. FORGE, ESQ.  
ASSISTANT U.S. ATTORNEYS  
880 FRONT STREET  
SAN DIEGO, CA 92101

FOR DEFENDANT WILKES:

FEDERAL DEFENDERS, INC.  
BY: REUBEN C. CAHN, ESQ.  
SHEREEN J. CHARLICK, ESQ.  
225 BROADWAY, STE. 900  
SAN DIEGO, CA. 92101

FOR DEFENDANT FOGGO:

AKIN GUMP STRAUSS HAUSER & FELD  
BY: PAUL BUTLER, ESQ.  
1333 NEW HAMPSHIRE AVE., N.W.  
WASHINGTON, DC 20036-1564

1 COURT REPORTER:

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1 SAN DIEGO, CALIFORNIA - TUESDAY, SEPTEMBER 4, 2007 - 2:00 P.M.

2 THE CLERK: CALLING NO. 14 ON THE CALENDAR, 07CR329,  
3 UNITED STATES OF AMERICA VERSUS BRENT ROGER WILKES.

4 COUNSEL, PLEASE STATE YOUR APPEARANCES FOR THE  
5 RECORD.

6 MR. CAHN: REUBEN CAHN AND SHEREEN CHARLICK ON  
7 BEHALF OF MR. WILKES, WHO'S PRESENT IN THE COURTROOM.

8 I'D ASK FOR MY ADMISSION PRO HAC VICE IN THIS CASE  
9 AND WAIVE MY ADMISSION TO THE CALIFORNIA BAR.

10 THE COURT: OF COURSE. THE COURT GRANTS THAT  
11 MOTION.

12 MS. CHU: VALERIE CHU, JASON FORGE, AND PHIL HALPERN  
13 FOR THE UNITED STATES.

14 THE COURT: THIS WAS ON TODAY ON THE WILKES-FOGGO  
15 MATTER TO CONFIRM APPOINTMENT OF FEDERAL DEFENDERS ON BEHALF  
16 OF MR. WILKES.

17 MR. GERAGOS: MARK GERAGOS IS HERE. GOOD  
18 AFTERNOON.

19 THE COURT: GOOD AFTERNOON.  
20 DO YOU HAVE ANYTHING ELSE TO SAY ABOUT SUBSTITUTION  
21 OF COUNSEL ON THE WILKES-FOGGO CASE?

22 MR. GERAGOS: I DO NOT.

23 THE COURT: ANYTHING ELSE I SHOULD KNOW BEFORE I  
24 CONFIRM YOUR APPOINTMENT? WE HAD A TRIAL DATE SET. I THINK  
25 I'VE MADE VERY CLEAR THAT WE CAN'T HOLD THAT TRIAL DATE AT

1 THIS POINT.

2 MR. CAHN: OBVIOUSLY, WE'RE NOT EVEN IN A POSITION  
3 TO BEGIN TO COMMENT ON WHAT AN APPROPRIATE TRIAL DATE WOULD  
4 BE. I WAS IN WASHINGTON, AND MS. CHARLICK WAS AWAY WHEN WE  
5 WERE APPOINTED. WE'VE BEGUN WORKING ON THE CASE, BUT WE  
6 HAVEN'T EVEN RECEIVED DISCOVERY YET. I DON'T THINK THERE'S  
7 ANYTHING ELSE THE COURT NEEDS TO KNOW IN REGARD TO THE  
8 APPOINTMENT OF COUNSEL.

9 THE COURT: NO. THE COURT WILL RECOGNIZE, THEN,  
10 THAT MR. CAHN AND MS. CHARLICK ARE COUNSEL FOR MR. WILKES ON  
11 THE WILKES-FOGGO MATTER. AND MR. GERAGOS, WHO WAS PREVIOUSLY  
12 RELIEVED, I CONFIRM THAT DECISION.

13 NOW, I THINK WE WERE ALSO ON FOR STATUS. I GOT A  
14 HUGE FAX FROM SOMEBODY AT THE DEPARTMENT OF JUSTICE, WHICH  
15 CAME IN LATE FRIDAY. I HAVEN'T BEEN ABLE TO GO THROUGH THAT  
16 YET. I DIDN'T BOTHER BECAUSE I DIDN'T THINK IT RELATED TO  
17 SOMETHING TO BE HEARD TODAY. IN FACT, I WAS TOLD IT DID NOT.

18 IS THAT RIGHT?

19 MS. CHU: AT THE CLOSE OF THE LAST HEARING, THERE  
20 WAS A REQUEST THAT THE PARTIES CONFER TO DRAFT A DRAFT OF A  
21 MOTION TAKING INTO ACCOUNT ALL THE THINGS THAT YOUR HONOR HAD  
22 ORDERED. THE PARTIES ATTEMPTED TO DO SO. THERE WERE AREAS OF  
23 DISAGREEMENT. AND THEREFORE, THE PARTIES SUBMITTED SEPARATELY  
24 THEIR DRAFT ORDERS IN THIS CASE WITH SOME MOTIONS AS TO WHY --

25 THE COURT: I'M NOT SURE I GOT ANYTHING FROM COUNSEL

1 FROM MR. FOGGO.

2 DID YOU SUBMIT ANYTHING, MR. DOBER OR MR. --

3 MR. BUTLER: YES, YOUR HONOR. PAUL BUTLER FOR  
4 MR. DOBER.

5 YES, YOUR HONOR. I BELIEVE ABOUT A WEEK AGO, WE  
6 SUBMITTED PAPERS AND A PROPOSED ORDER THAT TRACKED THE  
7 LANGUAGE FROM YOUR HONOR FROM THE LAST HEARING TO A POINT,  
8 MORE OR LESS TAINTING TO ADDRESS THE ISSUE OF MR. FOGGO'S  
9 ACCESS TO CERTAIN CIA WITNESSES.

10 THE GOVERNMENT FILED THEIR BRIEF ON FRIDAY, AND THEY  
11 DISAGREE WITH THAT PROCEDURE NOW. WE FILED ACTUALLY A REPLY  
12 BRIEF LAST NIGHT. WE'RE PREPARED TO ARGUE IT TODAY. IF YOU  
13 PREFER, WE CAN ALSO PUT IT OVER.

14 THE COURT: I THINK THERE WERE 150 PAGES FAXED. I  
15 DON'T THINK THEY GOT HERE UNTIL --

16 MR. HALPERN: I'M NOT SURE EXACTLY WHAT YOU'RE  
17 TALKING ABOUT.

18 THE COURT: 190 PAGES, I'M TOLD.

19 WILL YOU GRAB THAT?

20 IT CAME IN, MR. HALPERN, LIKE AT 5:30 ON FRIDAY.

21 MR. HALPERN: YOUR HONOR, I'VE BEEN TOLD THAT MY  
22 PLEADINGS --

23 THE COURT: IT WASN'T FROM YOU. IT WAS FROM  
24 SOMEBODY AT THE DEPARTMENT OF JUSTICE.

25 MR. HALPERN: OURS IS ABOUT 17 PAGES. SO I'M NOT

1 AWARE OF EXACTLY WHAT PLEADING YOU RECEIVED.

2 MR. BUTLER: MAYBE -- WE SUBMITTED A FILING THROUGH  
3 THE COURT SECURITY OFFICER WITH CERTAIN EX PARTE MATERIALS  
4 THAT WE PROVIDED TO THE COURT IN SUPPORT OF OUR MOTION, AND  
5 THAT MAY BE WHAT YOU RECEIVED IN ORDER. TO MAKE SURE WE WERE  
6 COMPLYING WITH THE CLASSIFICATION REQUIREMENTS, WE SUBMITTED  
7 THOSE DOCUMENTS.

8 THE COURT: WE'LL SEE. AS I SAID, IT CAME IN SO  
9 LATE I DIDN'T HAVE A CHANCE TO LOOK AT IT. I WAS INFORMED IT  
10 WAS FROM --

11 MR. HALPERN: I MUST SAY, YOUR HONOR, IF THOSE ARE  
12 WITH RESPECT TO MR. BUTLER, I'M A LITTLE SURPRISED BY THE FACT  
13 THAT THERE WOULD HAVE BEEN ANOTHER EX PARTE FILING AFTER THE  
14 LAST COURT HEARING WHERE -- I KNOW WE DIDN'T SETTLE  
15 EVERYTHING. THE PARTIES DID HAVE A DISAGREEMENT. BUT I  
16 THOUGHT ONE OF THE THINGS WE CLEARLY AGREED UPON, THAT THERE  
17 WOULD BE NO MORE EX PARTE FILINGS WITHOUT NOTICE TO THE OTHER  
18 SIDE.

19 MR. BUTLER: IT WAS ON NOTICE IN CONNECTION WITH THE  
20 BRIEF THAT WAS FILED, YOUR HONOR, WITH ADDITIONAL MATERIALS IN  
21 SUPPORT OF THAT BRIEF, I BELIEVE, THAT WE FILED THROUGH THE  
22 COURT SECURITY OFFICER, IF I'M CORRECT.

23 IS THAT RIGHT, MR. LONDERGAN?

24 MR. LONDERGAN: THE DOJ -- IT'S PROBABLY BECAUSE IT  
25 CAME OUT FROM THE DOJ FAX.

1 THE COURT: THAT'S WHAT IT IS. I WAS INFORMED,  
2 MR. LONDERGAN AND MR. BUTLER, THAT THIS HAD ACTUALLY BEEN  
3 TRANSMITTED FROM THE DEPARTMENT OF JUSTICE. AND I SAID, "WHY  
4 ARE YOU SENDING ME 190 PAGES OF STUFF AT THIS POINT?" IT  
5 TURNS OUT THAT THIS IS, IN FACT, A DOCUMENT THAT WAS  
6 TRANSMITTED THROUGH YOU. AND I THINK IT WAS THE COVERSHEET  
7 THAT THREW THE CLERK OFF.

8 SO I HAVE IT NOW IN FRONT OF ME. IT IS A RENEWED  
9 MOTION TO COMPEL ACCESS TO SPECIALIZED COMPARTMENTED  
10 INFORMATION FILED ON BEHALF OF MR. FOGGO BY MR. MAC DOUGALL,  
11 MR. BUTLER, MR. PELLEGRINO, AND MR. DOBER.

12 THE PROBLEM IS I HAVEN'T HAD A CHANCE TO REVIEW THIS  
13 YET. I'M HAPPY TO TAKE A LOOK AT IT.

14 I'M ASSUMING THAT THE BULK OF THIS BEYOND THE MOTION  
15 ITSELF ARE JUST EXHIBITS THAT I CAN QUICKLY PAGE THROUGH?

16 MR. BUTLER: THEY ARE, YOUR HONOR. THEY'RE  
17 REFERENCED, I THINK, INDIRECTLY IN THE MOTION PAPERS. THEY  
18 ARE OUR INITIAL SUBMISSION TO THE COURT ON OUR -- WHY WE  
19 BELIEVE THE ACCESS THAT WE'RE REQUESTING TO THESE WITNESSES IS  
20 RELEVANT AND MATERIAL TO THE CASE.

21 AND AS YOUR HONOR RECALLS, AT THE LAST HEARING WHAT  
22 YOUR HONOR LAID OUT IS -- THE PROCEDURE TO FOLLOW WAS TO  
23 SUBMIT A PROPOSED ORDER LAYING OUT A TAINING PROCEDURE, WHICH  
24 WE FEEL IS ENTIRELY COMMONPLACE AND DONE IN MANY OTHER  
25 INSTANCES IN ATTORNEY-CLIENT PRIVILEGE SITUATIONS.

1           SINCE THEN, WE'VE HAD DISCUSSIONS WITH THE  
2           GOVERNMENT. THEY NO LONGER AGREE TO THAT PROCEDURE. THEY  
3           WANT TO SET UP A SERIES OF -- THEY CAN CHARACTERIZE IT IN  
4           THEIR ARGUMENTS, BUT A SERIES OF EX PARTE CONFERENCES BEFORE  
5           YOUR HONOR WHERE THEY PRESENT AND WE PRESENT WHAT WE BELIEVE  
6           WOULD TRACK EXACTLY WHAT YOUR HONOR WANTED TO PUT INTO PLACE.  
7           AND THIS WOULD BE A SUBMISSION THAT WOULD GO TO THAT  
8           SCREENED-OFF DOJ ATTORNEY TO SHOW WHY IT'S RELEVANT THAT WE --

9           THE COURT: REFRESH MY MEMORY, BUT I DON'T WANT TO  
10          GO BACKWARD ON THIS. I THOUGHT I'D ALREADY RULED ON THIS AND  
11          THERE WAS AN AGREED-UPON PROCEDURE. MR. FORGE SAID OKAY. AT  
12          THE END OF THE DAY, WE WERE GOING TO GET SOMEBODY FROM THE  
13          DEPARTMENT OF JUSTICE TO FIELD THESE THINGS AND TO RAISE  
14          OBJECTIONS ON BEHALF OF THE UNITED STATES AND THAT THAT PERSON  
15          WOULD NOT COMMUNICATE WITH THE ASSIGNED PROSECUTOR TO SAY,  
16          "HERE'S WHAT THEY'RE ASKING FOR. HERE'S WHY THEY THINK IT'S  
17          RELEVANT." I THOUGHT THAT THAT TOOK CARE OF THE PROBLEM OF  
18          PROTECTING THE DEFENDANT'S 5TH AND 6TH AMENDMENT RIGHTS AND AT  
19          THE SAME TIME FACILITATING THE CIPA SECTIONS 5 AND 6  
20          PROCEDURE.

21          MR. HALPERN: I COULDN'T DISAGREE MORE, YOUR HONOR,  
22          WITH THE CHARACTERIZATION BY MR. BUTLER.

23          THE COURT: WHICH ONE?

24          MR. HALPERN: BY THE FACT THAT WE AGREED ON A  
25          PROCEDURE. I HAVE NOW READ THE COURT'S TRANSCRIPT OF 100 PLUS



1 PAGES. I CAN SAY CLEARLY THERE IS NO AGREEMENT. WE THOUGHT  
2 THERE WAS PERHAPS AN AGREEMENT, AND WE CALLED TO THE DEFENSE  
3 TO TRY TO SEE IF, IN FACT, THERE WAS A MEETING OF THE MINDS.  
4 BECAUSE IT WAS ALWAYS THE GOVERNMENT'S POSITION IN THESE  
5 HEARINGS THAT WE WERE ENTITLED TO KNOW WHAT THEY WERE LOOKING  
6 FOR, JUST NOT WHY THEY WERE LOOKING FOR IT.

7 CLEARLY, IF YOU READ THE TRANSCRIPT, THE COURT GAVE  
8 SEVERAL INDICATIONS THAT AT LEAST YOU WERE ONBOARD THINKING  
9 THAT AT VARIOUS TIMES. I QUOTE RIGHT FROM THE END, PAGE 100,  
10 "IF THE DEFENDANTS' DEMAND" -- NOW, THIS IS A QUOTE FROM THE  
11 COURT -- "HAS THE EFFECT OF REQUESTING ADDITIONAL DOCUMENTS  
12 FROM THE GOVERNMENT, IT'S ENTIRELY PROPER FOR THE MAIN  
13 PROSECUTION TEAM TO BE INVOLVED," BECAUSE THERE WAS A  
14 RECOGNITION BY THE COURT THAT IF THIS WAS A DISCOVERY DISPUTE,  
15 WE NEEDED TO KNOW WHAT THEY WERE ASKING. IF WE DIDN'T KNOW  
16 WHAT THEY WERE ASKING, WE WERE IN NO POSITION TO RESPOND.

17 THE TAINING, TO THE EXTENT WE UNDERSTOOD THAT THE  
18 COURT WAS GOING TO PROPOSE IT, WOULD BE IF, IN FACT, THERE HAD  
19 TO BE A DEBATE AS TO WHY THIS WAS NEEDED, WHAT THE RELEVANCE  
20 WAS. THE GOVERNMENT HAS NEVER AGREED NOR IS THERE ONE SINGLE  
21 CASE THAT WOULD EVER SUPPORT THE FACT THAT THERE CAN BE A  
22 DISCOVERY REQUEST MADE UPON THE GOVERNMENT, BUT THE GOVERNMENT  
23 DOESN'T LEARN WHAT THAT REQUEST IS.

24 THE COURT: MR. BUTLER, LET ME STOP YOU. I THINK  
25 HE'S CORRECT ON THAT, BECAUSE I CLARIFIED THAT WITH

1 MR. MAC DOUGALL AT THE END. I SAID, "LOOK, THE STANDARD  
2 REQUEST FOR ADDITIONAL DOCUMENTS WOULD GO TO THESE ASSIGNED  
3 PROSECUTORS."

4 HERE'S WHAT THE CONCERN IS: THE BOTTOM LINE CONCERN  
5 IS THEY DON'T GET TO KNOW WHY YOU THINK THIS IS RELEVANT.  
6 THEY DON'T GET TO KNOW WHAT YOUR THEORIES OF DEFENSE ARE OR  
7 WHAT THEORIES YOU'RE EXPLORING.

8 AND I THOUGHT THE WAY THAT WE WOULD RESOLVE THAT  
9 ISSUE WAS TO SAY, "OKAY. IF YOU MAKE THE REQUEST AND SOMEBODY  
10 SAYS 'I DISAGREE WITH IT,' THE CIA SAYS 'I DISAGREE WITH IT,'  
11 FOR EXAMPLE, THEN WE HAVE A LAWYER ALSO ON THIS TEAM  
12 REPRESENTING THE UNITED STATES WHOSE SOLE RESPONSIBILITY WOULD  
13 BE TO EVALUATE THE BASIS FOR THE REASON AND THEN ADVISE THE  
14 CIA AND SAY, 'I THINK THEY'RE ENTITLED TO IT IF THIS IS THEIR  
15 THEORY.'" I THINK LEGALLY THAT'S CORRECT. AND THAT PERSON  
16 DESIGNATED AT THE DEPARTMENT OF JUSTICE WOULD HAVE NO CONTACT  
17 AND WOULD NOT COMMUNICATE TO THESE PROSECUTORS WHAT THE BASIS  
18 WAS.

19 BUT I THINK MR. HALPERN IS QUITE RIGHT, AND THE  
20 EXCERPT HE READ IS APROPOS. THIS CAME UP AT THE END OF THE  
21 HEARING. AND I SAID, "LOOK, AS TO OTHER REQUESTS, BULK  
22 DOCUMENTS AND THINGS LIKE THAT, THAT WILL GO IN THE ORDINARY  
23 COURSE.

24 THIS SPECIAL ACCOMMODATION, WHICH AT FIRST THEY  
25 GROUCHED ABOUT -- MR. FORGE CAME AROUND TO AGREEING WITH IT,

1 BUT AT FIRST THEY GROUCHED ABOUT IT -- THIS SPECIAL  
2 ACCOMMODATION WAS MADE SO THAT I COULD SORT OF TAKE THE EDGE  
3 AND THE TENSION OFF OF WHAT I PERCEIVED TO BE A 5TH AMENDMENT  
4 AND 6TH AMENDMENT PROBLEM WITH YOU HAVING TO REVEAL YOUR  
5 THEORIES OF DEFENSE TO THEM IN ORDER TO GET DISCOVERY.

6 MR. BUTLER: AND I THINK THAT'S WHAT OUR PROPOSED  
7 ORDER TRACKED. HERE, I THINK, IS THE DIFFERENCE: WE HAVEN'T  
8 MADE A RULE 16 DOCUMENT REQUEST YET. THEY KEEP TRYING TO  
9 PIGEONHOLE THIS INTO THE CIPA PROCESS RIGHT NOW. IT'S CLEAR  
10 THAT CIPA SECTION 4, RULE 16 DEALS WITH DOCUMENTS. WE ASK FOR  
11 DOCUMENTS. THEY SAY, "WE DON'T WANT TO GIVE THEM TO YOU.  
12 WE'LL EITHER REDACT THEM OR WE'LL REFUSE TO GIVE THEM TO YOU,  
13 PUT SUBSTITUTIONS IN."

14 WE ARE SIMPLY ASKING TO DO THE MOST FUNDAMENTAL  
15 THING THAT A DEFENSE LAWYER DOES IN THE COURSE OF TRYING TO  
16 INVESTIGATE THE CASE AND PUT A DEFENSE TOGETHER, AND THAT IS  
17 TO TALK TO WITNESSES. WE HAVE A HANDFUL, MAYBE MORE, OF CIA  
18 WITNESSES WHO HAVE SAID THAT THEY'RE WILLING TO SIT DOWN AND  
19 TALK TO US.

20 WE BELIEVE THAT SOME OF THE TOPICS THAT ARE MATERIAL  
21 TO THE DEFENSE -- AND THAT'S WHAT OUR SUBMISSION IS, IS OUR  
22 FIRST SUBMISSION TO THE COURT TO SHOW WHY THIS IS NOT A  
23 FISHING EXPEDITION. YOU'LL SEE IN THE GOVERNMENT PAPERS --  
24 THIS IS NOT UNRELATED CONDUCT. THESE ARE PROGRAMS THAT ARE  
25 DIRECTLY RELATED TO THE CONTRACT THAT'S AT THE HEART OF THIS

1 INDICTMENT.

2 THE DEFENDANT HAS A 5TH AND 6TH AMENDMENT RIGHT TO  
3 SIT DOWN AND TALK TO WITNESSES WITH INFORMATION THAT'S  
4 MATERIAL TO THE DEFENSE. THE CIA SAYS, "YOU CAN'T DO THAT.  
5 THEY'RE BLOCKING US." THEY SAID UNDER THE TOUHY REGULATIONS  
6 AND UNDER THEIR VIEW OF WHAT THEY'RE REQUIRED TO DO, THAT THEY  
7 ARE NOT GOING TO READ US INTO THIS COMPARTMENT THAT THE  
8 PROGRAM COVERS OR TO ALLOW THE WITNESSES TO OTHERWISE SPEAK  
9 WITH US.

10 THE COURT: THIS IS A SITUATION THAT I HOPED THAT  
11 THE INDEPENDENT PERSON FROM THE DEPARTMENT WOULD BE INVOLVED  
12 WITH, MR. HALPERN, TO SAY, "OKAY. TELL ME WHAT YOUR THEORY IS  
13 AND WHY YOU THINK YOU NEED TO TALK TO THESE WITNESSES. I'M  
14 FORBIDDEN FROM TALKING TO THE CASE PROSECUTORS. SO I CAN'T  
15 GIVE ANY INFORMATION TO THEM THAT MIGHT COMPROMISE THE DEFENSE  
16 OR ITS THEORIES." THAT'S DIFFERENT FROM PRODUCTION OF  
17 DOCUMENTS.

18 MR. HALPERN: LET ME ADDRESS THAT. BUT BEFORE WE  
19 GET THERE, WE'RE OFF TRACK. WE ARE WAY FAR FROM WHERE WE  
20 SHOULD BE.

21 POINT NO. 1, MR. BUTLER SAYS THIS IS NOT ABOUT A  
22 DISCOVERY REQUEST. IT'S NOT RULE 16 DISCOVERY. WELL, IF IT  
23 ISN'T THAT, I WANT TO SIT DOWN. THAT'S THE END OF THIS.  
24 BECAUSE IF IT'S A REQUEST OF THE CIA UNDER TOUHY, WE KNOW WHAT  
25 THE ANSWER IS. THEY CAN GO LITIGATE IT IN VIRGINIA IF THEY'RE

1 ARBITRARY AND CAPRICIOUS.

2 IF THEY WANT TO MAKE A DISCOVERY REQUEST -- AND IF  
3 YOU READ THEIR BRIEF, THEY TIE THEMSELVES IN KNOTS, IN MY  
4 OPINION, TO MISLEAD THE COURT AS TO WHAT THEY'RE DOING IN  
5 NEITHER FISH NOR FOWL. BECAUSE IF IT'S A DISCOVERY REQUEST,  
6 WE CAN DEAL WITH IT AS A DISCOVERY REQUEST. BUT THEY DON'T  
7 WANT TO MAKE -- THEY'RE NOT TELLING US WHAT THEY WANT. AND  
8 THAT'S THE PROBLEM.

9 AND I MIGHT ALSO SAY IF IT IS A DISCOVERY REQUEST  
10 AND YOU WANT TO LOOK AT THE COURTS AND WHAT THEY SAY, THEY  
11 CLEARLY MAKE NO EXCEPTION FOR THIS AREA OF PRE-DISCOVERY.  
12 THIS IS ALL ABOUT GETTING DISCOVERY, AND IT'S ALL ABOUT GRAY  
13 MAIL.

14 LOOKING AT THE EXACT WORDS OF WHAT MR. MAC DOUGALL  
15 SAID, YOUR HONOR, WHEN HE WAS HERE, HE ASKED THE COURT. AND  
16 THE COURT SAID, "WHAT SHOULD THE RELIEF BE?" HIS COMMENT TO  
17 THE COURT WAS HE WANTED YOU TO ORDER THE CIA TO GIVE THE  
18 DEFENSE ACCESS TO CLASSIFIED INFORMATION, TO WHICH THE CIA WAS  
19 OBJECTING. IF THAT'S NOT GRAY MAIL, THERE IS NO SUCH THING AS  
20 GRAY MAIL.

21 THE COURT: I DISAGREE WITH YOU THAT WE'RE OFF TRACK  
22 HERE. THE CONTEXT OF THIS MOTION IS THEY WANT ACCESS TO SOME  
23 WITNESSES. AND THE CIA IS SAYING, "NO, WE'RE NOT GOING TO  
24 PERMIT YOU TO TALK TO THEM EVEN THOUGH THE WITNESSES HAVE  
25 INDICATED THAT THEY'RE WILLING TO TALK."

1 THE CIA, I THINK, NEEDS TO HAVE SOMEBODY FROM THE  
2 PROSECUTION INFORM THEM THAT "LOOK, WE THINK THIS IS  
3 LEGITIMATE. THIS GOES TO A THEORY OF DEFENSE. WE THINK IT'S  
4 LIKELY THAT THE COURT WOULD ORDER YOU TO DO THIS, SO GO AHEAD  
5 AND DO IT."

6 MR. HALPERN: THE CIA SAYS, "YOU DON'T HAVE A RIGHT  
7 TO THE INFORMATION YOU WANT." THAT'S WHAT THEY SAY. THEY  
8 SAID, "YOU CAN HAVE ACCESS TO WITNESSES. THIS ISN'T ABOUT  
9 ACCESS TO WITNESSES. IT'S ABOUT ACCESS TO INFORMATION. AND  
10 THE CIA SAYS, "NO, YOU CAN'T HAVE THAT." AND THE DEFENSE  
11 UNDERSTANDS NOW UNDER THIS LAW THEY HAVE NO RIGHT TO IT UNLESS  
12 THEY COME BACK TO DISCOVERY. IF THEY WANT TO MAKE THAT  
13 SHOWING, THEN EVERY CASE SAYS YOU TELL THE GOVERNMENT WHAT YOU  
14 WANT. WE DON'T CARE.

15 THE COURT: I'VE IMPOSED A SLIGHTLY DIFFERENT  
16 PROCEDURE HERE. WHEN WE GET TO THE POINT OF TELLING THE  
17 GOVERNMENT WHAT YOU WANT, I'VE SAID THAT THAT SHOWING WILL BE  
18 MADE THROUGH AN INDEPENDENT LAWYER WHO'S NOT GOING TO DISCUSS  
19 THIS WITH THE PROSECUTORS BECAUSE THERE'S TENSION THAT I  
20 FORESEE WITH THEM HAVING TO SAY, "HERE'S WHY WE WANT TO TALK  
21 TO THIS GUY." THAT COMPROMISES THE DEFENDANTS' 5TH AMENDMENT  
22 AND 6TH AMENDMENT RIGHTS.

23 THE SIMPLE SOLUTION, MR. HALPERN, IS TO SAY, "OKAY.  
24 WE'VE GOT ANOTHER GUY WHO'S FULLY VERSED IN RULE 16 AND CIPA."  
25 AND YOU'LL MAKE THE APPROPRIATE DECISIONS. AND IF HE

1 DISAGREES, THEN HE'LL COME TO THE COURT WITH MR. BUTLER AND  
2 ARGUE THAT THIS IS NOT REASONABLE. THIS ISN'T REASONABLY  
3 RELATED. THIS IS GRAY MAILING. BUT THE PROSECUTORS WHO ARE  
4 ACTUALLY GOING TO PROSECUTE THIS CASE WON'T KNOW ABOUT WHAT  
5 THE THEORY IS. THEY WON'T HAVE THAT JUMP ON THE DEFENSE.

6 MR. HALPERN: YOU'RE PROBABLY GOING TO QUESTION MY  
7 STATEMENT, AND I DON'T SAY THIS LIGHTLY. YOU ARE NOW GIVING  
8 THE GOVERNMENT ACTUALLY MORE THAN WE ARE ASKING FOR. THE  
9 GOVERNMENT BELIEVES ALL THEY REALLY HAVE TO TELL US IS WHAT  
10 THEY WANT; WHATEVER THE COMPARTMENTS ARE, WHATEVER THE  
11 INFORMATION IN THE COMPARTMENTS. THEY DON'T HAVE TO TELL US  
12 WHY.

13 FROM WHAT I UNDERSTAND THE COURT IS SAYING, AND IT  
14 DID SO REACHING IN A VERY PRAGMATIC WAY, "OKAY. YOU'RE RIGHT.  
15 YOU HAVE TO TELL THEM 'WELL, WE HAVEN'T SEEN THAT YET IN  
16 DISCOVERY.'" BUT ASSUMING I GET IT, THEY HAVE TO TELL US  
17 WHAT. BUT AS TO THE WHY, THAT GOES TO A TAINT TEAM.

18 WHAT I'M ABOUT TO TELL YOU IS WE'RE GOING TO DECLINE  
19 THAT. WE'RE HAPPY TO BE LITIGATING WITHOUT THE TAINT TEAM AS  
20 LONG AS THEY TELL US WHY. AND THE REASON I'M SAYING THAT IS  
21 YOU'RE SAYING, "YOU'RE GIVING AWAY SOMETHING. YOU DON'T HAVE  
22 TO GIVE IT AWAY." THAT POSITION IS ODD, TO SAY THE LEAST.

23 THE REASON I'M TAKING THAT POSITION IS AFTER I  
24 LOOKED AT THE CASE LAW, I CAN TELL YOU, YOUR HONOR, THAT THERE  
25 ARE CIPA CASES SUPPORTING WHAT I'M SAYING. I HAVEN'T SEEN ANY

1 CIPA CASES SUGGESTING THAT A TAIN'T TEAM IS APPROPRIATE. I'VE  
2 SPOKEN TO PEOPLE ALL THE WAY UP TO THE DEPARTMENT OF JUSTICE,  
3 THE NATIONAL SECURITY DIVISION. THEY BELIEVE SETTING UP A  
4 TAIN'T TEAM HAS A NUMBER OF PROBLEMS THAT PERHAPS WE CAN  
5 OVERCOME. PERHAPS WE CAN'T. CAST ISSUES THERE, SUPERVISORY  
6 ISSUES, A NUMBER OF ISSUES WHICH THEY BELIEVE THEY WOULD NOT  
7 WANT TO DRAFT IN HERE.

8 SO AS FAR AS I'M SAYING WITH THE GOVERNMENT, I'M  
9 ASKING ACTUALLY FOR LESS. THIS IS WHAT I'VE TRIED TO GET THE  
10 DEFENSE TO AGREE TO. THEY WOULDN'T AGREE TO THIS. THEY  
11 WOULDN'T AGREE TO JUST TELLING US WHAT, WHICH IS WHY I BELIEVE  
12 THIS IS SIMPLY ANOTHER WAY TO GRAY MAIL THE GOVERNMENT, YOUR  
13 HONOR, BECAUSE CLEARLY, I'M ASKING FOR LESS THAN I THINK THE  
14 COURT WAS EVEN WILLING TO AGREE TO GIVE US, AND THEY WOULDN'T  
15 DO IT.

16 IF THE COURT SAYS "HEY, YOU'RE GETTING MORE,  
17 MR. HALPERN. YOU SHOULD LIKE IT," I CAN TRY AGAIN. BUT THE  
18 FACT OF THE MATTER IS WE'RE HAPPY SIMPLY KNOWING THE WHAT.  
19 AND IF IT'S A QUESTION OF WHY, WE'RE HAPPY WITH THE COURT  
20 GOING TO YOU. WE CAN GO TO YOU EX PARTE IF IT'S NECESSARY AND  
21 SAY WHY IT'S NOT RELEVANT. BUT WE NEED TO KNOW WHAT IT IS.  
22 WE NEED TO HAVE A DISCOVERY REQUEST, AND WE CAN HANDLE IT  
23 THEN. BUT THAT'S THE ONLY WAY WE CAN HANDLE IT.

24 MR. BUTLER: YOUR HONOR, WITH ALL DUE RESPECT, THE  
25 GOVERNMENT'S ISSUES, VAGUE AS THEY ARE, CAST OR SUPERVISORY,



1       WHATEVER THEY MAY BE, DO NOT SUPERSEDE THE DEFENDANTS' 5TH AND  
2       6TH AMENDMENT RIGHTS TO INTERVIEW WITNESSES.

3               MR. HALPERN SAYS, "I'VE SEEN NO CASES." THERE ARE  
4       CASES. WE'VE CITED SOME CASES, SUDADAWA (PHONETIC) AND  
5       OTHERS, WHERE THE GOVERNMENT HAS DONE SOMETHING TO BLOCK THE  
6       DEFENDANTS' ACCESS TO INTERVIEWING WITNESSES FOR INFORMATION  
7       THAT'S MATERIAL TO THE DEFENSE. IT COMES UP SOMETIMES WHEN A  
8       WITNESS IS DEPORTED IN THE MIDDLE OF A CASE AND THE DEFENSE  
9       DOESN'T HAVE A CHANCE TO TALK TO THEM.

10              ALL THESE ISSUES THAT THE GOVERNMENT HAS, I DON'T  
11       UNDERSTAND THEM. A TAIN'T TEAM IS PUT IN PLACE IN MANY  
12       INSTANCES. I JUST WORKED WITH ONE. THE GOVERNMENT EXECUTED A  
13       SEARCH WARRANT AND TOOK ATTORNEY-CLIENT PRIVILEGED DOCUMENTS.  
14       THEY'RE IN BOXES. THEY'RE CLEARLY MARKED. THE PROSECUTORS  
15       REALIZED "I DON'T WANT TO LOOK AT THAT INFORMATION." THEY SET  
16       UP A TAIN'T TEAM RELEVANT TO THAT INFORMATION. WHETHER THE  
17       PARTS LAW EXCEPTION APPLIED WAS LITIGATED WITH THE TAIN'T TEAM  
18       ATTORNEY.

19              I HAVEN'T HEARD ANYTHING FROM THE GOVERNMENT NOW OR  
20       IN THEIR PAPERS THAT THEY SUBMITTED THAT CLEARLY ARTICULATES  
21       WHAT THE INTEREST IS THAT SUPERSEDES THE DEFENDANTS' RIGHT TO  
22       DO THE MOST BASIC THING, AND THAT IS TO SIT DOWN WITH  
23       WITNESSES THAT HAVE DIRECT INFORMATION ON THE CONTRACT THAT  
24       THEY INDICTED. THIS IS NOT GRAY MAIL. WE'RE NOT ASKING FOR  
25       THE CIA PROGRAM THAT HAS NOTHING TO DO WITH THE INDICTMENT.

1 WE WANT TO KNOW INFORMATION FROM WITNESSES THAT ARE INDICTED  
2 ON A SPECIFIC COUNT OF THE INDICTMENT.

3 THE COURT: MR. BUTLER, WHAT ABOUT THE POINT  
4 MR. HALPERN MAKES WHERE HE SAYS, "LOOK, JUST TELL US WHAT  
5 INFORMATION IT IS. NOT WHY YOU THINK IT'S RELEVANT, BUT WHAT  
6 THE INFORMATION IS THAT YOU'RE SEEKING TO ELICIT. AND THEN  
7 WE'LL MAKE A DECISION." THAT SOUNDS TO ME LIKE TANTAMOUNT  
8 WITH "TELL US WHAT DOCUMENTS YOU WANT, AND WE'LL EITHER TURN  
9 THEM OVER OR WE'LL RAISE AN OBJECTION."

10 MR. BUTLER: THAT DOESN'T APPLY TO THE DEFENDANTS'  
11 RIGHT TO INTERVIEW WITNESSES. THESE WITNESSES ARE IN -- THE  
12 WITNESSES ARE NOT TECHNICALLY IN ANYBODY'S CONTROL. THESE ARE  
13 GOVERNMENT EMPLOYEES. FOR US TO TIP OUR HAND, SO TO SPEAK,  
14 ABOUT OUR THEORY OF THE CASE BY GOING TO THE TRIAL TEAM AND  
15 SAYING "THIS IS WHAT WE WANT TO TALK TO OUR WITNESSES ABOUT,  
16 WITNESSES WHO HAVE AGREED TO SIT DOWN AND TALK TO US," THERE'S  
17 NO OTHER EXAMPLE THAT I CAN THINK OF WHERE WE'VE SAID "WE WANT  
18 TO TALK TO THIS WITNESS WHO'S VOLUNTARILY AGREED TO MEET WITH  
19 US." AND WE HAVE TO TELL YOU WHAT IT IS WE WANT TO TALK TO  
20 THEM ABOUT.

21 MR. HALPERN: YOUR HONOR, THIS IS -- WITH ALL DUE  
22 RESPECT TO MR. BUTLER, HE'S AN ADVOCATE. HE'S DOING A GOOD  
23 JOB FOR HIS CLIENT. I THINK HE'S TRYING TO MISLEAD THE COURT.  
24 WE TRIED TO ADDRESS THIS --

25 THE COURT: I DON'T THINK ANYBODY'S TRYING TO

1 MISLEAD ME. I THINK THERE'S DIFFERENCES OF OPINION ABOUT WHAT  
2 THE PROCEDURE OUGHT TO BE. I DON'T FEEL LIKE I'M BEING MISLED  
3 OR ANYBODY IS ATTEMPTING TO MISLEAD ME ON EITHER SIDE.

4 MR. HALPERN: WELL, LET ME PUT IT THIS WAY: IF THAT  
5 WAS REALLY HIS INTEREST, THE GOVERNMENT AGREED LONG AGO TO A  
6 QUIET PERIOD. WE SAID, "WELL, IF YOU'RE JUST AFRAID OF US  
7 GETTING TO THESE PEOPLE, WE'LL JUST TAKE A COUPLE WEEKS." BUT  
8 THAT'S NOT WHAT IT'S ABOUT. IT'S ABOUT THE INFORMATION.  
9 THAT'S WHAT THEY WANT. WE'RE DEALING WITH CLASSIFIED  
10 INFORMATION. IT'S WHY CIPA HAS CONTROL.

11 IF YOU LOOK AT IT, YOUR HONOR, THIS IS SIMPLY A  
12 MATTER OF DEALING WITH ANOTHER FORM OF GOVERNMENT PROPERTY.  
13 WHETHER YOU CALL IT INFORMATION THAT'S ON A DOCUMENT OR  
14 INFORMATION THAT A PERSON HAS IN THEIR HEAD OR WHETHER IT'S  
15 INFORMATION THAT'S IN A COMPUTER AS A HARD DRIVE, THE CASE  
16 LAW -- AND THERE IS NUMEROUS CASE LAW, WHICH I KNOW MR. BUTLER  
17 IS AWARE OF IN HANDLING THESE TYPES OF CASES THAT MAKE IT  
18 CLEAR THAT CLASSIFIED INFORMATION IS PROPERTY. IT'S PROPERTY  
19 OF THE GOVERNMENT. THAT'S WHAT THEY'RE LOOKING FOR.

20 THE COURT: MR. HALPERN, NONE OF THAT IS IN DISPUTE.  
21 HERE'S WHAT THE NARROW DISPUTE IS: WHAT I GLEAN FROM THE  
22 ARGUMENT SO FAR IS THAT IN MAKING A REQUEST OF WHAT WE WANT, I  
23 CAN'T MAKE A CLEAR DISTINCTION BETWEEN WHAT THEY WANT AND WHY  
24 THEY WANT IT. THOSE TWO THINGS SEEM TO BLEND TOGETHER A  
25 LITTLE BIT.

1                   AND TO THE EXTENT THAT THEY HAVE TO ASK FOR THINGS  
2           WHERE IT'S GOING TO BE READILY APPARENT WHY THEY'RE ASKING FOR  
3           IT JUST BY THE REQUEST FOR PRODUCTION, I'VE SET UP A PROCEDURE  
4           THAT IS FAITHFUL TO CIPA. I'M NOT ASKING THAT ANYTHING NOT  
5           GOING AROUND CIPA. I'M JUST SAYING BRING SOMEBODY ELSE IN  
6           WHO'S FAMILIAR WITH CIPA AND CAN EVALUATE THE REQUESTS AND  
7           MAKE THE COMMON SENSE DECISION "DOES THIS SEEM RIGHT OR DOES  
8           THIS SEEM LIKE WE'RE TRYING TO BE HIGH-JACKED HERE? DOES IT  
9           SEEM LIKE THEY'RE ASKING THIS JUST TO PUT US IN A POSITION  
10          WHERE WE'RE GOING TO HAVE TO SAY NO AND MAYBE FACE GETTING A  
11          COUNT DISMISSED OR NOT BE ABLE TO PROCEED ON SOMETHING BECAUSE  
12          WE'RE NOT GOING TO GIVE THEM INFORMATION THAT THEY'RE ENTITLED  
13          TO?"

14                   AND THAT PERSON IS SEPARATE AND APART FROM THE  
15          PROSECUTORS WHO ARE PROSECUTING THE CASE. THAT HARMONIZES THE  
16          CONCERNS I HAVE. IT'S FAITHFUL TO CIPA, AND AT THE SAME TIME  
17          IT PROTECTS THIS FELLOW.

18                   WHAT'S WRONG WITH THAT?

19                   MR. HALPERN: STARTING FROM THE OUTSET, YOUR HONOR,  
20          THE PREMISE I HAVE A PROBLEM WITH. IT'S NOT NECESSARILY THE  
21          PREMISE OF YOUR PROCEDURE. IT'S THE PREMISE WITH MR. BUTLER  
22          SAYING, "LOOK, JUDGE, ALL WE WANT ARE THINGS THAT ARE OUTLINED  
23          IN THE INDICTMENT. THE PROGRAMS ARE ONES THAT ARE OUTLINED IN  
24          THE FOUR CORNERS OF THE INDICTMENT."

25                   IF THAT IS TRUE, WHY WON'T YOU JUST TELL US? WE

1 ALREADY KNOW IT. IS THAT GIVING AWAY SOMETHING? IT'S THE  
2 VERY PROGRAMS IN THE INDICTMENT.

3 THE COURT: THE PROBLEM COMES WITH THE LEVEL OF  
4 SPECIFICITY. THE CIA IS PROBABLY SAYING, "YOU'VE GOT TO HUM A  
5 FEW MORE BARS BEFORE WE'RE GOING TO LET YOU TALK TO THESE  
6 PEOPLE OR BEFORE WE'RE GOING TO AGREE TO LET THEM TALK TO YOU  
7 ABOUT THUS AND SO." AND THE PROBLEM IS IF HE'S ANY MORE  
8 SPECIFIC, THEN HE GIVES UP WHAT THE THEORY OF DEFENSE IS. AND  
9 YOU'RE NOT ENTITLED TO KNOW THAT.

10 MR. HALPERN: YOUR HONOR, IF YOU THINK HE'S BEING  
11 NOT SPECIFIC ENOUGH, WE CAN ADDRESS THAT AT THE RIGHT TIME.  
12 THE PROPER WAY TO DO THIS, THE PROPER WAY TO DO EVERY  
13 DISCOVERY REQUEST I'VE EVER SEEN IS THEY SERVE A REQUEST ON  
14 THE GOVERNMENT, AND WE SAY "YES" OR WE SAY "NO." IF WE SAY  
15 "NO" AND THEY THINK THEY NEED TO GO TO THE COURT, THEY CAN GO  
16 TO THE COURT AND BE MORE SPECIFIC THERE IN TERMS OF  
17 EXPLORING --

18 THE COURT: HERE'S WHAT YOU'RE NOT ADDRESSING: HE  
19 SAYS EVEN IN MAKING THE REQUEST TO YOU, "IF I TELL YOU,  
20 MR. HALPERN, I WANT TO TALK TO WITNESSES A, B, AND C ABOUT  
21 THESE THINGS," HE SAYS, "JUST IN MAKING THAT REQUEST, YOU'RE  
22 GOING TO KNOW WHY WE THINK THAT THEY'RE RELEVANT."

23 WHAT IF HE SAYS TO YOU "I WANT TO TALK TO -- WE  
24 BELIEVE THIS PERSON MADE A STATEMENT THAT WAS EXCULPATORY ON  
25 OUR CLIENT ON AN EARLIER OCCASION. WE WANT TO TALK TO HIM

1 ABOUT THAT"?

2 AND YOU SAY, "I DIDN'T KNOW ABOUT THAT. WE'VE  
3 INTERVIEWED THIS PERSON. HE NEVER MENTIONED ANYTHING ABOUT  
4 THAT. NOW I'M GOING TO DECIDE THAT I'M EITHER GOING TO GO  
5 BACK AND REINTERVIEW HIM OR STRAIGHTEN HIM OUT OR I'M NOT  
6 USING THIS GUY," WHICH GIVES YOU AN ADVANTAGE, OF COURSE, THAT  
7 YOU WOULDN'T OTHERWISE HAVE IN THE ORDINARY CASE.

8 MR. HALPERN: HERE'S MY PROBLEM, AND IT'S A SLIPPERY  
9 SLOPE: AGAIN, YOU'RE NOW MOVING AWAY. IF YOU ARE NOW  
10 EMBRACING THE POINT THAT THE DEFENSE HAS BEEN TRYING TO  
11 PREVAIL ON AS TO WE'RE NOT ENTITLED TO KNOW WHAT -- AND I'M  
12 TALKING THE PROSECUTION TEAM NOW -- IF YOU'RE SAYING WE'RE NOT  
13 ENTITLED TO KNOW WHAT THEY WANT AS WELL AS WHY THEY WANT IT, I  
14 CAN TELL YOU THAT NO CASE HAS EVER EMBRACED THAT.

15 CASES -- AND I CAN GIVE THE COURT CITATIONS, CASES  
16 THEY'VE CITED. THEY'VE CITED THE POINDEXTER CASE. I WAS  
17 AMAZED, YOUR HONOR, BECAUSE I READ THE POINDEXTER CASE. YOU  
18 KNOW WHAT IT SAYS? IT SAYS IF THEY WANT SOMETHING, THEY TELL  
19 THE GOVERNMENT WHAT THEY WANT, AND THEY CAN GO EX PARTE AS TO  
20 THE WHY. IT'S IN FOOTNOTE 16 WHAT THEY CITED.

21 THE COURT: MR. HALPERN, IT'S SIMPLE WHEN WE'RE  
22 TALKING ABOUT DOCUMENTS. IT'S A SIMPLE DISTINCTION TO MAKE.  
23 "WE WANT X DOCUMENTS. WE'RE NOT GOING TO TELL YOU WHY. WE  
24 JUST WANT TO SEE THEM." IT'S GETS DICIER WHEN YOU'RE TALKING  
25 ABOUT INTERVIEWING WITNESSES. AND THE CIA IS INSISTING ON

1 SOME LEVEL OF SPECIFICITY AS TO WHAT YOU'RE GOING TO ASK THE  
2 WITNESSES.

3 I'M TELLING YOU IN ANSWERING THAT, IT'S NOT AS  
4 SIMPLE AS SAYING, "I WANT A, B, AND C." IT GIVES UP A LITTLE  
5 BIT OF THE WHY.

6 MR. HALPERN: TO BE HONEST, IT REALLY IS. I SAY  
7 THAT WITH ALL DUE RESPECT TO THE COURT. BECAUSE IF WE LOOK AT  
8 THEIR SPECIFIC REQUEST, I'M NOT SAYING WE'LL NEVER REACH THE  
9 POINT YOU ARE. BUT LET'S TAKE IT ONE POINT AT A TIME.  
10 THEY'RE ASKING TO BE READ INTO CERTAIN COMPARTMENTS. ALL THEY  
11 HAVE TO DO IS TELL US THE NAME OF THE COMPARTMENTS, THE  
12 INITIALS. I CAN'T UNDERSTAND WHY THEY'RE NOT DOING THAT.

13 THE COURT: WHAT ABOUT THAT, MR. BUTLER? IF IT'S  
14 THAT HIGH LEVEL OF GENERALITY, THAT DOESN'T GIVE UP MUCH TO  
15 SAY "WE GENERALLY WANT TO SPEAK ABOUT THIS. WE'RE NOT GOING  
16 TO TELL YOU THE SPECIFIC QUESTIONS. WE'RE NOT GOING TO GIVE  
17 YOU A SCRIPT OF QUESTIONS WE INTEND TO ASK, BUT THIS IS THE  
18 COMPARTMENT," AS THEY CALL IT IN THE LEXICON OF THE CIA.

19 MR. BUTLER: I THINK YOUR HONOR HIT ON IT AT THE  
20 LAST HEARING. THAT WOULD BE THE FIRST STEP, AND WE QUICKLY  
21 MOVE BEYOND THAT TO SAY --

22 THE COURT: WE HAVEN'T GONE TO THAT YET. HE'S  
23 SAYING, "TAKE US TO THE FIRST STEP. AND WE MAY SAY, YES, WE  
24 CAN CONCEIVE -- WE, THE CASE PROSECUTORS HERE, CAN CONCEIVE OF  
25 WHY THEY'D WANT TO TALK TO A WITNESS ABOUT THAT." I THINK YOU

1        OUGHT TO DO THAT. I THINK MR. MAC DOUGALL AGREED TO THAT.

2                HERE'S WHERE I'M GOING TO STEP IN AND I INSIST THAT  
3        THEY PUT IN AN INDEPENDENT PERSON: IF IT GETS DOWN TO YOUR  
4        THEORIES OR WHY YOU THINK IT'S RELEVANT TO THE DEFENSE THAT  
5        YOU WANT TO PURSUE A CERTAIN COMPARTMENT OR INQUIRY INTO A  
6        CERTAIN COMPARTMENT, THEN I'M GOING TO INSIST THAT THEY DO  
7        WHAT THEY TOLD ME THEY'D DO AT THE LAST HEARING, WHICH IS HAVE  
8        AN INDEPENDENT PERSON FROM THE DEPARTMENT OF JUSTICE FIELD  
9        THAT REQUEST. AND IF THERE'S AN OBJECTION, THAT PERSON CAN  
10       COME OUT AND LITIGATE ON BEHALF OF THE GOVERNMENT WITH YOU.  
11       AND I THINK THAT HARMONIZES THE CONCERNS I HAVE.

12               I HAVE A CONCERN THAT HE NOT HAVE TO GIVE UP HIS  
13       THEORIES. IF THAT'S THE WAY CIPA WORKS IN THE ORDINARY  
14       COURSE, MR. HALPERN, IT DOESN'T WORK VERY FAIRLY. IT'S A  
15       DIFFERENT KIND OF ANIMAL THAN IT IS IN EVERY OTHER CASE WHERE  
16       A DEFENDANT DOESN'T HAVE TO GIVE UP ANYTHING ABOUT HIS THEORY  
17       OF DEFENSE IN ORDER TO GAIN RELEVANT DISCOVERY.

18               MR. HALPERN: WE'RE NOT ASKING FOR THE THEORY OF  
19       DEFENSE.

20               MR. BUTLER: IT DO THINK THAT EVEN DIRECTING THEM TO  
21       THE SPECIFIC COMPARTMENT THAT WE'RE TALKING ABOUT WOULD REVEAL  
22       AND AWFUL LOT ABOUT THE THEORY THAT WE'RE PURSUING.

23               THE COURT: I DON'T AGREE WITH THAT, MR. BUTLER. I  
24       THINK YOU CAN SAY, "LOOK, WE WANT TO TALK TO SOMEBODY ABOUT  
25       THIS GENERIC SUBJECT MATTER. WE'RE NOT GOING TO TELL YOU WHAT



1 WE'RE GOING TO ASK. WE'RE NOT GOING TO TELL YOU WHAT WE'RE  
2 ARMED WITH OR WHAT OUR THESIS IS GOING IN. BUT THIS IS WHAT  
3 WE WANT TO TALK ABOUT." LET THEM MAKE THE ASSESSMENT IN THE  
4 FIRST INSTANCE. I THINK THAT THAT'S A CLOSE ANALOGY TO THE  
5 DOCUMENT CASES THAT MR. HALPERN HAS RAISED.

6 MR. BUTLER: JUST TO BE CLEAR, YOUR HONOR, WHEN THE  
7 ANSWER COMES BACK "NO"?

8 THE COURT: THEN WE GO TO ROUND 2. ROUND 2 IS YOU  
9 AND THE INDEPENDENT FELLOW OR WOMAN FROM THE DEPARTMENT OF  
10 JUSTICE CAN COME IN AND ARGUE RELEVANCY WITH ME, AND THESE  
11 PROSECUTORS WILL NOT BE PRESENT FOR THAT. AND THE PERSON FROM  
12 THE DEPARTMENT WILL BE UNDER AN ORDER NOT TO REVEAL TO THEM  
13 WHAT THE SPECIFIC THEORIES OF THE DEFENSE ARE.

14 MR. HALPERN: THE ONLY CAVEAT I WOULD HAVE, YOUR  
15 HONOR -- AND I CAN'T SEE ANY OBJECTION TO THIS -- IS THAT THE  
16 GOVERNMENT ITSELF, MEANING THE PROSECUTION TEAM, WE MIGHT EVEN  
17 CHOOSE TO RESPOND EVEN WITHOUT THE INFORMATION. PERHAPS THE  
18 DEPARTMENT PERSON WOULD BE IN A BETTER POSITION, AND PERHAPS  
19 WE'LL LET THEM DO IT. IF WE THINK IT'S CRYSTAL CLEAR, WE  
20 MIGHT DO IT.

21 THE COURT: THAT'S WHAT I'M HOPING. I'M HOPING TO  
22 AVERT ROUND 2 BY HAVING YOU SAY, "FINE. WE GET IT. WE KNOW  
23 THIS CASE. WE CAN UNDERSTAND WHY SOMEBODY PURSUING A DEFENSE  
24 WOULD WANT TO TALK TO THESE PEOPLE ABOUT THIS GENERAL SUBJECT  
25 MATTER. SO WE APPROVE. WE'LL SO NOTIFY THE CIA." AND THEN

1 WE WON'T BE BACK HERE EACH TIME THEY WANT TO DO AN INTERVIEW.

2 I THINK THAT WAS THE RULING THAT I MADE LAST TIME.

3 IF I WASN'T CLEAR ABOUT IT, I APOLOGIZE. BUT THAT'S WHAT I  
4 INTENDED. I'M DOING MY BEST TO PREVENT THEM FROM KNOWING WHAT  
5 YOUR THEORIES ARE AND HOW YOU INTEND ON DEFENDING THIS FELLOW  
6 AND WHAT INFORMATION YOU GLEAN THROUGH INDEPENDENT  
7 INVESTIGATIONS THAT CAUSES YOU TO WANT TO LOOK FURTHER.

8 BUT IF IT'S JUST A MATTER OF GENERICALLY IDENTIFYING  
9 DOCUMENTS OR SO-CALLED COMPARTMENTS, THAT IS, VERY GENERALIZED  
10 DESCRIPTIONS OF THE AREA OF INFORMATION YOU WANT TO INTERVIEW  
11 ABOUT, I THINK IT'S INCUMBENT UPON YOU, MR. BUTLER AND  
12 MR. FOGGO'S OTHER LAWYERS, TO GO TO THESE LAWYERS IN THE FIRST  
13 PLACE AND FOLLOW THE RULE 16 PROCEDURES AND SAY, "HERE'S WHAT  
14 WE WANT TO TALK ABOUT. WE'RE NOT GOING TO TELL YOU ANYTHING  
15 MORE THAN THE GENERAL SUBJECT MATTER." IF IT GETS STICKIER  
16 BEYOND THAT, THEN I'LL INSIST THAT THEY BRING IN THE PERSON.

17 BY THE WAY, DO WE HAVE A PERSON DESIGNATED ALREADY  
18 AT THE DEPARTMENT PURSUANT TO THE --

19 MR. HALPERN: WE DON'T, YOUR HONOR, BECAUSE THEY  
20 OBJECTED TO IT. BUT WE'LL GO BACK THERE NOW UNDERSTANDING --

21 THE COURT: TELL THEM THAT I'VE ORDERED THAT. THEY  
22 HAVE RECOURSE. THEY CAN APPEAL THE ORDER IF THEY DON'T LIKE  
23 IT. THAT'S WHAT I'VE ORDERED. I THINK I'VE CLARIFIED TODAY  
24 THE SCOPE OF THAT PERSON'S RESPONSIBILITIES.

25 MR. HALPERN: UNDERSTANDING THAT WE KNOW THE WHAT

1 AND THEY HANDLE THE WHY, I THINK THAT MIGHT BE A DIFFERENT  
2 STORY.

3 THE COURT: THAT'S A GOOD WAY TO PUT IT.

4 MR. BUTLER: I UNDERSTAND WHEN I WENT TO SIT DOWN,  
5 BUT LET ME JUST MAKE ONE MORE POINT.

6 THAT IS THAT I THINK WE'RE ENGAGED IN KIND OF A  
7 FRUITLESS EXERCISE HERE IN THE SENSE THAT IF YOU READ THE  
8 GOVERNMENT'S PAPERS THAT THEY FILED ON FRIDAY NIGHT, IT'S  
9 HENNY PENNY, THE SKY IS FALLING.

10 UNDER THOSE CIRCUMSTANCES, WILL ANYBODY EVER  
11 ASSOCIATED WITH THIS DEFENSE TEAM EVER GET ACCESS TO THIS  
12 INFORMATION? WE'RE GOING THROUGH A FORMALITY HERE, YOUR  
13 HONOR. IT'S GOING TO DO NOTHING BUT REVEAL OUR DEFENSE TO  
14 THEM AND RESULT IN US JUST MOVING ON.

15 THE COURT: NO, THAT ISN'T GOING TO HAPPEN,  
16 MR. BUTLER. BECAUSE, AS I SAID, IF YOU DO WHAT I'VE ASKED YOU  
17 TO DO, WHICH IS TO COMMUNICATE TO THEM "THIS IS THE GENERAL  
18 AREA OF INQUIRY THAT WE WANT ACCESS TO" AND THEY SAY "NO,"  
19 THEN, AS FAR AS I'M CONCERNED, THAT TRIGGERS THE NEXT ROUND,  
20 WHICH IS YOU SAY, "OKAY. WE REALLY BELIEVE THAT WE ARE  
21 ENTITLED TO DO THIS. WE WANT TO TALK TO YOUR PERSON AT DOJ  
22 AND TELL THEM WHY." THEN THE DISPUTE IS CRYSTALLIZED. AND IT  
23 COMES TO ME, AND I'LL MAKE THE DECISION.

24 THIS IS NOT AN EXERCISE IN FUTILITY. I'M GOING TO  
25 TAKE MR. HALPERN AT HIS WORD THAT HE'S GOING TO ACT IN GOOD

1 FAITH. THESE THREE PROSECUTORS AND MR. BHANDARI KNOW THE CASE  
2 VERY WELL. IT MAY BE THAT THEY CAN LOOK AT A GENERIC REQUEST  
3 AND SAY, "THIS MAKES SENSE TO US. IF WE WERE DEFENDING  
4 MR. FOGGO, WE'D ASK FOR ACCESS TO THIS COMPARTMENT, TOO."  
5 THAT MAY BE THE END OF IT.

6 NOW, I'M NOT GOING TO BE POLLYANNA ABOUT IT. IF  
7 DISPUTES DEVELOP, THEN I'VE SET UP A MECHANISM FOR RESOLVING  
8 THOSE. AND I WILL.

9 MR. HALPERN, GO BACK AND TELL THEM THAT THIS IS WHAT  
10 I'VE ORDERED. "IF YOU DON'T LIKE IT, GO TO THE 9TH CIRCUIT."

11 MR. HALPERN: THANK YOU, YOUR HONOR.

12 MR. BUTLER: THANK YOU, YOUR HONOR.

13 THE COURT: ANYTHING ELSE ON THE -- ARE YOU SURE YOU  
14 WANT TO GET INTO THIS?

15 MR. CAHN: I HAVE MY DOUBTS, BUT I'VE TOLD  
16 MR. WILKES THAT WE'RE WITH HIM 100 PERCENT, THAT WE'RE HERE.

17 THE COURT: THAT WILL BE THE PROCEDURE, OBVIOUSLY,  
18 THAT I'LL FILE ONCE YOU GET YOUR SLEEVES ROLLED UP AND GET  
19 INTO THE CASE AS WELL. I THINK WHILE IT MAY BE NEWFANGLED,  
20 I'M COMFORTABLE WITH IT. AS I SAID, I THINK IT PROTECTS THE  
21 DEFENDANTS' 5TH AND 6TH AMENDMENT RIGHTS. I WOULDN'T EXPECT  
22 YOU TO REVEAL THEORIES OF DEFENSE IN ORDER TO GET ACCESS TO  
23 INFORMATION THAT'S RELEVANT. SO THE SAME RULE AND WHATEVER  
24 ORDER EMANATES FROM ALL OF THIS WILL FIND MR. WILKES AS WELL.

25 ANYTHING ELSE ON WILKES-FOGGO TODAY?

1 MR. BUTLER: NO.

2 MS. CHU: IS THERE A DATE FOR US TO COME BACK?

3 THE COURT: I WANT TO SET A DATE.

4 HOW MUCH TIME DO YOU THINK BEFORE YOU CAN BE --

5 MR. CAHN: A STATUS IN ABOUT A MONTH. WE'RE GOING  
6 TO DIG IN. I'M DROPPING EVERYTHING. I'M REQUIRING  
7 MS. CHARLICK TO DROP QUITE A FEW THINGS, ALSO. WE'RE GOING TO  
8 DIG IN AND TRY AND FIGURE OUT EXACTLY WHERE WE ARE. I THINK  
9 IN A MONTH, WE'D BE IN A DECENT POSITION TO AT LEAST DISCUSS  
10 THAT WITH THE COURT.

11 THE COURT: DOES THAT SEEM FAIR TO EVERYONE  
12 CONCERNED, A MONTH FOR STATUS?

13 MR. BUTLER: YES.

14 THE COURT: OBVIOUSLY, MR. BUTLER, IF THIS ISSUE --  
15 I DON'T EXPECT IT TO STALL YOUR PREPARATION FOR A MONTH. IF  
16 THIS THING CRYSTALLIZES AND IT DOESN'T HAPPEN AS I'D HOPE AND  
17 AS I THINK WE HAVE AN UNDERSTANDING, THEN YOU'RE FREE TO FILE  
18 ANOTHER MOTION AND COME BACK HERE AND I'LL RESOLVE IT AS SOON  
19 AS POSSIBLE.

20 I DO WANT YOU WITH ALL DELIBERATE SPEED TO  
21 COMMUNICATE THE COURT'S ORDER TO THE DEPARTMENT OF JUSTICE AND  
22 GET SOMEBODY DESIGNATED. I WAS TOLD A WHILE AGO THAT THAT  
23 WOULD HAPPEN SO THE PERSON COULD BE UP TO SPEED AT THIS POINT  
24 BECAUSE THAT'S NECESSARILY GOING TO DELAY THIS IF --

25 MR. HALPERN: WE UNDERSTAND THE COURT'S ORDER. THAT

1       SHOULDN'T BE A PROBLEM.

2               YOUR HONOR, THERE WAS ONE OUTSTANDING PART OF OUR  
3       PAPERS THAT PERHAPS WE CAN RESOLVE, ALSO. THAT JUST HAS TO DO  
4       WITH A REQUEST FOR A PRE-TRAIL CONFERENCE UNDER CIPA. PERHAPS  
5       THE DATE THAT THE COURT HAS INDICATED WOULD BE AN APPROPRIATE  
6       TIME TO DO THAT.

7               THE COURT: HAS IT CRYSTALLIZED TO THAT EXTENT WHERE  
8       YOU CAN MAKE A --

9               MR. BUTLER: I DON'T BELIEVE SO, YOUR HONOR.

10              MR. HALPERN: IT'S JUST A CONFERENCE, YOUR HONOR.  
11       AT THE CONFERENCE, THEN WE CAN GET DATES. WHAT I'M SAYING IS  
12       IT MIGHT MAKE SENSE FOR THE COURT TO GIVE BOTH SIDES A MONTH  
13       OR SO. WE CAN THEN COME BACK AND SAY HOW LONG WE THINK IT  
14       WILL TAKE SO THE COURT CAN JUST SOMEHOW --

15              THE COURT: WHY DON'T I SET THAT PRE-TRIAL  
16       CONFERENCE DATE AS THE STATUS DATE. BECAUSE WHAT I'D LIKE AT  
17       THIS POINT INSOFAR AS POSSIBLE IS THAT THIS PROCEEDS NOT ON  
18       SEPARATE TRACKS WITH MR. WILKES AND MR. FOGGO, BUT TOGETHER.

19              BECAUSE I'M ASSUMING, MR. HALPERN, THAT THE REQUESTS  
20       ARE GOING TO BE JOINT REQUESTS; THAT ONE DEFENDANT IS GOING TO  
21       JOIN IN THE OTHER DEFENDANT'S REQUESTS. THERE'S GOING TO BE  
22       MAYBE SOME DIFFERENCES. BUT I THINK IF DISPUTES DEVELOP ABOUT  
23       BEING READ INTO SOME COMPARTMENTS, THAT BOTH DEFENDANTS ARE  
24       GOING TO HAVE AN INTEREST IN THAT.

25              SO I WANT TO GIVE MR. CAHN AND MS. CHARLICK A MONTH

1 TO GET READY. I'LL SET THE PRE-TRIAL CONFERENCE AT THE NEXT  
2 STATUS HEARING ON WILKES-FOGGO.

3 IS THAT AGREEABLE?

4 MR. CAHN: JUDGE, IF I CAN BE CLEAR BECAUSE I  
5 UNDERSTAND THAT THERE ARE SEVERAL CONFERENCES THAT TAKE PLACE  
6 UNDER CIPA.

7 THIS WOULD BE ONE SIMPLY TO DISCUSS THE STATUS AND  
8 NOT TO DESIGNATE THOSE MATERIALS THAT WOULD BE DISCLOSED?

9 THE COURT: THAT'S RIGHT. THIS IS FOR ME TO SET --  
10 I GUESS MR. HALPERN WANTS ME TO SET A DEADLINE FOR THE  
11 BEGINNING OF THE DESIGNATION PROCESS OR A DATE BY WHICH THE  
12 SUBMISSIONS SHOULD BE TO ME.

13 MR. HALPERN: IT'S SIMPLY A CIPA SECTION 2  
14 CONFERENCE. WE'RE NOT TRYING TO SUGGEST DATES. IF THE COURT  
15 WANTS US TO, WE CAN. WE'RE NOT TRYING TO UNILATERALLY SUGGEST  
16 WHAT THE DATE SHOULD BE JUST TO GOVERN THE DISCOVERY PROCESS,  
17 SO THAT YOU'LL KNOW WHEN BOTH SIDES WILL BE READY TO PUT THEIR  
18 DISCOVERY REQUEST IN.

19 THE COURT: THEY'RE LABORING UNDER A BIG  
20 DISADVANTAGE HAVING JUST GOTTEN INVOLVED IN THE CASE. I'M  
21 GOING TO GIVE THEM A MONTH.

22 REMIND ME, MR. HALPERN. I'LL SET THE PRE-TRIAL  
23 CONFERENCE DATE AT THE HEARING, THE STATUS DATE, NEXT MONTH.

24 OCTOBER 9TH. LET'S SET IT AT 3:00 SO PEOPLE DON'T  
25 HAVE TO WAIT. OCTOBER 9TH AT 3:00.

1 IS THAT A CONVENIENT TIME FOR YOU, MR. BUTLER?

2 MR. BUTLER: THAT'S FINE, YOUR HONOR. THANK YOU.

3 THE COURT: MR. WILKES, YOU'LL NEED TO BE BACK ON  
4 THAT DATE.

5 DEFENDANT WILKES: YES, YOUR HONOR.

6 THE COURT: YOU'LL BE HERE BEFORE THEN, TOO. YOU'LL  
7 HAVE TO BE BACK ON THAT DATE ON THE SECOND CASE, WILKES-FOGGO.

8 MS. CHARLICK: WE'RE FINE.

9 THE COURT: OCTOBER 9TH AT 3:00 P.M. FOR STATUS AND  
10 THE SETTING OF THE PRE-TRIAL CONFERENCE IN THE WILKES-FOGGO  
11 MATTER.

12 I'LL REVIEW THE COMPETING ORDERS AND TRY TO  
13 HARMONIZE THEM AND COME UP WITH A FINAL ORDER RESPECTING THIS  
14 DECISION THAT I'VE MADE ABOUT ACCESS TO WITNESSES AND  
15 MATERIAL.

16 THAT'S IT FOR WILKES-FOGGO. THANK YOU.

17 MR. BUTLER: THANK YOU, YOUR HONOR.

18 --000--

19 I HEREBY CERTIFY THAT THE TESTIMONY  
20 ADDUCED IN THE FOREGOING MATTER IS  
21 A TRUE RECORD OF SAID PROCEEDINGS.

22

23 S/EVA OEMICK 9-21-07

24 EVA OEMICK DATE  
25 OFFICIAL COURT REPORTER